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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

NO. 79-5269

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT EDWARDS, Petitioner

v.

THE STATE OF ARIZONA, Respondent

ON WRIT OF CERTIORARI TO
THE ARIZONA SUPREME COURT

PETITIONER'S SUPPLEMENTAL BRIEF

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ARGUMENT

PROSECUTION HAD COMMENCED AGAINST EDWARDS, AND THE RIGHT OF COUNSEL HAD THEREBY ATTACHED.

In its Answering Brief the State conceded that Edwards had been formally charged and that his Sixth Amendment right to counsel had arisen. Indeed, its second question presented for review was whether one who "has been formally charged" may waive his right to an attorney. The argument contained under that section of the Brief expressly acknowledged the same.[1] In the Court below, the State did not dispute the point.[2]

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[1] The State said:

> "The Petitioner notes that the rights afforded by *Massiah* apply whether or not the person has an attorney. *McLeod v. Ohio*, 381 U.S. 356 (1965). Respondent acknowledges that Petitioner's right to an attorney existed from the moment he was formally charged by the State on January 19, 1976". Brief for Respondent, p. 24, fn. 47.

[2] The Sixth Amendment issue, of the right to counsel for an accused who has been formally charged, was briefed to the Arizona Supreme Court. The State never asked that Court, which of course completely understood the method of commencing prosecution in Arizona by complaint, conclude that Edwards had no right to counsel because he had not been formally charged. *See* Appellant's Opening Brief in the Arizona Supreme Court, p. 15 *et seq.*; and Appellee's Answering Brief, p. 18 *et seq.*, discussing *Brewer v. Williams*, 430 U.S. 387 (1977), *Massiah v. United States*, 377 U.S. 201 (1964), and other authorities.

By Supplemental Brief, the State now contends that *United States v. Duvall*, 537 F.2d 15 (2d Cir. 1976), establishes that the Arizona complaint procedure does not constitute formal prosecution. *Duvall* is no precendent for what obtains under Arizona procedure. Indeed, the distinction is apparent for, under the Federal scheme of things, the complaint specified by Rule 3 of the Federal Rules of Criminal Procedure *cannot* commence prosecution. *See* United States Constitution, V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."); *United States v. Counts*, 471 F.2d 422, 425 (2d Cir. 1973) (prosecution for purposes of the statute of limitations does not begin until "the indictment is found or the information is instituted . . ., 18 U.S.C. §3282").

In Arizona, the significance of the complaint differs from that of the Federal procedures analyzed in *Duvall*. *See* Petitioner's Brief, p. 29-31, describing the Arizona Rules of Criminal Procedure at Issue, and particularly Rule 2.2 which specifies that "felony actions may be commenced

(a) by indictment . . . or (b) by the filing of a complaint . . . ." This case was begun by complaint.[3]

This Court, the Second Circuit, and the District of Pennsylvania all have held that State complaint procedures like that of Arizona begin formal prosecution, thus invoking the right to counsel.

In *Moore v. Illinois*, 434 U.S. 220 (1977), this Court, in a *Wade and Gilbert* case[4] reversed the Court of Appeals, which had concluded that the defendant's right to counsel arose only after the defendant was indicted. Reiterating that the right to counsel arose "'at or after the initiation of adversary judicial criminal proceedings', including proceedings instituted 'by way of formal charge [or] preliminary hearing'", 434 U.S. at 228, this Court held

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[3] In practice, it has become common in Arizona to take a case originally begun by complaint before the Grand Jury for a supervening indictment in order to avoid having to provide an open, preliminary hearing to the defendant. Ariz. R. Crim. P. 12.7(c), 17 Ariz. Rev. Stat. Ann. (1973), specifies the method of giving notice of the supervening indictment to "the defendant and his counsel" and was included, as the drafters' comment notes, for "those cases in which the defendant already has counsel appointed to represent him". *Ibid.* This is another indication that Arizona treats the complaint as the commencement of prosecution. This supervening indictment did occur in this case.

[4] *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

that the prosecution had been commenced under Illinois law when the victim's complaint was filed in court. *Ibid.*[5]

In *United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972), the Second Circuit held that prosecution had begun, and the accused had a right to counsel, after the information charging commission of a crime had been laid before a magistrate pursuant to Section 144 of New York's Code of Criminal Procedure.[6]

Finally, *United States ex rel. Burton v. Cuyler*, 439 F. Supp. 1173 (E.D. Pa. 1977), held that Pennsylvania's complaint procedure marked the commencement of prosecution for right to counsel purposes. By contrast, *Duvall*, interpreting Fed. R. Crim. P. 3, *could not* have held that the Federal complaint procedure was the beginning of prosecution, *Cf. United States v. Duvall, supra*, 537 F.2d at 21-22 (distinguishing *Duvall* from *United States ex rel. Robinson v. Zelker, supra*).

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[5] *See* Illinois Rev. Stat., ch. 38, §111-1 (1975) ("a prosecution may be commenced by (a) a Complaint; (b) an Information; (c) an Indictment.").

[6] Section 144 has been superseded by a new Section 100.05, which authorizes the State to commence a prosecution by an indictment *or* a felony complaint, among other methods. The Code Reviser's Practice Commentary notes: "The filing of the felony complaint in the lower court -- not the indictment in the superior court -- commences this action". New York Criminal Procedure Law §100.05 (McKinney 1971) (Practice Commentary).

Ultimately, of course, the particular circumstances of the case also demonstrate that prosecution had been commenced. *United States ex rel. Burton v. Cuyler, supra,* 439 F. Supp. at 1181.[7] The record, as already extensively described, fully demonstrates that the police had solved this case, had gotten the complaint to begin prosecution and were conducting the interrogation for the development of trial evidence.

The State of Arizona was right when it first agreed that formal prosecution had commenced.

Two other points need briefly to be made. First, the State cites twelve different cases on pages 3 and 4 and makes various waiver arguments with them. With very few exceptions, these cases have been discussed in the principal briefs on the merits, and most of them are completely distinguishable from this case.[8] Moreover, the State characterizes

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[7] "[C]onsistent with the focus of *Kirby* on the initiation of a prosecution, we take into account the other circumstances prior to the lineup which suggest that the true reason for holding the lineup was to enhance the prosecution's evidence and that no investigative purpose would have been impeded by insuring that relator had an opportunity to have counsel present." *United States ex rel. Burton v. Cuyler,* 439 F. Supp. 1173, 1181 (1977).

[8] For example, involving defendant initiated statements, *Arington v. Maxwell,* 409 F.2d 849 (6th Cir. 1969); *United States v. Thomas,* 474 F.2d 110 (10th Cir. 1973); or express, written waivers, *United States v. Cobbs,* 481 F.2d 196 (3rd Cir. 1973); *United States v. Mandley,* 502 F.2d 1103 (9th Cir. 1974).

the requirement for stronger proof of an understanding, intelligent waiver of the Sixth Amendment right to counsel as a rule of the Second Circuit; it ignores the fact that *this Court* imposed the strict standard for waiver of this right. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973).

Secondly, because Edwards had once before been convicted of a crime, the State argues that when he was arrested on the present charges, and first attempted to talk for himself about making a deal, a waiver of his right to counsel was established, despite the heavy burden of proof imposed on the State.[9]

Yet, Edwards was given no information about the ramifications of the indictment, or the dangers and disadvantages of waiving his right to counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975). And, of course, he did not voluntarily relinquish his right to counsel. He asked for it; he resisted interrogation; and he made statements after protesting that he did not want them used against him in court. He

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[9] Once again, the State makes the error of arguing that Edwards was given his *Miranda* rights four times, when he was not. Supplemental Brief, p. 4.

simply did not voluntarily substitute the jail house interrogation for the trial process.

Respectfully submitted,

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